

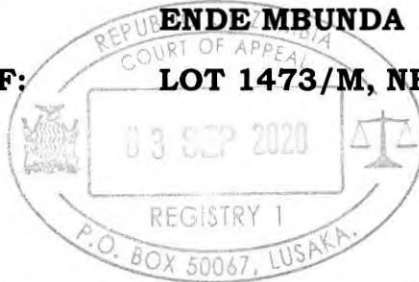
**IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

APPEAL NO. 142/2019

**IN THE MATTER OF: SECTION 81 OF THE LANDS AND DEEDS
REGISTRY ACT, CHAPTER 187 OF THE LAWS OF
ZAMBIA**

**IN THE MATTER OF: THE ESTATE OF THE LATE AUGUSTINE CHENDE-
ENDE MBUNDA**

IN THE MATTER OF: LOT 1473/M, NEW KASAMA



BETWEEN:

CYNTHIA KUNDA

1st APPELLANT

**(Suing in her capacity as Personal Representative
of the Estate of the late Augustine Chende-ende Mbunda)**

YVONNE KUNDA

2ND APPELLANT

**(Suing in her capacity as a Personal Representative
of the Estate of the late Augustine Chende-ende Mbunda)**

AND

LORETTA KUNDA

RESPONDENT

(Sued as Caveator)

CORAM: Chisanga JP, Sichinga and Ngulube JJA

On 25th August, 31st August and 3rd September 2020

For the Appellant: Mr. R. Musumali of Messrs SLM Legal Practitioners

For the Respondent: Mr. D. Mushenya of Messrs Wright Chambers

JUDGMENT

Cases referred to:

1. *Bailes v. Stacy and Another* (1986) ZR 83
2. *Anti-Corruption Commission v. Barnnet Development Corporation Limited* (2008) ZR 69 Vol. 1
3. *In the goods of William Loveday* (1900) P 154
4. *Buchman vs Attorney General* (1993-94) ZR 131

Other works referred to:

1. Philip H. Pettit *Equity and the Law of trust* 12th Edition. Oxford University Press
2. *Halsbury's Laws of England*, 4th Edition re-issue Volume 48

INTRODUCTION

1. In this appeal, the Appellants assail the decision of Sharpe-Phiri J, in which she dismissed their cause on a preliminary issue raised by the Respondent. In the court below, the Appellants sought for an order for removal of a caveat placed on Lot 1473/M Lusaka, by the Respondent.

BACKGROUND

2. The appellants commenced this action by way of Originating Summons in the Court below. They deposed in the affidavit in support that their late father, Augustine Chende-ende Mbunda (deceased father), died intestate on 26th September, 1976 and was survived by four daughters namely; Sharon Kunda Erinle and Catherine Chalwe Mbunda (now deceased), and the two appellants. His estate comprised of Lot 1473/M New Kasama, Lusaka, the certificate of title for the parcel of land being exhibited to the affidavit. It appears the Administrator General was appointed administrator to the deceased father's estate, as in or about 1978, the Administrator General

conveyed and assigned the property to the Appellant's mother, Margaret Chileshe Mbunda, as evidenced by the Lands Register.

3. In 1981, the Appellants' mother, Augustine Chende-ende Mbunda's surviving spouse, remarried and changed the children's names from Mbunda to Kunda, her second husband's name. Prior to her death, she began transferring portions of the property left by Augustine Chende-ende Mbunda by deed of gift to the children but demised before completion. Lot 1473/M was subdivided into three, and processing of title was underway when the Respondent, the Appellant's half-blood sister, placed a caveat on the entire property claiming an interest. It is the Appellants' belief that when their mother remarried, the only beneficiaries to the property were the issue from the union of their late father and mother.
4. Before the matter could be heard, the Respondent raised a preliminary issues as follows:
 - i. Whether the Appellants are clothed with the requisite *locus standi*, notwithstanding the representative capacity in which the Appellants have sought to commence these proceedings.
 - ii. Even assuming *arguendo* that the Applicants are reposed of the requisite *locus standi*, whether the property known as Lot 1473/M New Kasama, Lusaka, that was administered by the administrator general in 1978 could be re-administered in 2017.

- iii. Whether the applicants have complied with the Administrator General's Act, Chapter 58 of the Laws of Zambia, particularly Section 17 and 18(1) thereof, prior to the commencement of these proceedings
 - iv. Whether the Originating Process issued herein complied with Order VII Rule 1(a) and (b) of the High Court Rules CAP 27 of the Laws of Zambia.
5. It appears an affidavit in support of the Notice to raise preliminary issues was not filed. In opposition to the preliminary issue, Learned Counsel for the Appellants deposed that, the Appellants were not aware that the estate of their father had an administrator. After they had been issued with letters of administration, by the court, they conducted a search at the Lands and Deeds Registry, which revealed that the Administrator General had transferred the property in issue to their mother. They engaged the Administrator General, who later advised the appellants' Counsel that the Office had never dealt with the estate of the Appellants' deceased father. Learned Counsel thus believed that the Appellants were duly appointed as personal representatives of the state of their deceased father.
6. At the hearing of the preliminary issue, Counsel for the Respondent submitted that the Originating summons was defective for failure to disclose the physical and postal address of the Appellants. He cited authorities that stated that the address is vital, and that rules of the Court are intended to assist the Court in the proper administration of justice. He pressed the court to strike the Originating Summons off for irregularity.

7. Learned Counsel argued that the Appellants lacked the requisite *locus standi* to commence the action. That the property in question belonged to Margaret Chileshe Mbunda as it was assigned to her by the Administrator-General in 1978 and that when she died; the property was part of her estate. Counsel contended that it was a misconception for the appellants to commence the action in a representative capacity, when the property belonged to the estate of their mother. That the two estates were separate. Learned Counsel also argued that a certificate of title is conclusive evidence of ownership, challengeable only on grounds of fraud. According to him, the assertion that the Administrator-General assigned the property to the Appellants' mother as trustee for the appellants was not supported by evidence.
8. Counsel for the Appellants' opposition was that the irregularity in the Originating Summons was not fatal but curable. He cited authorities to that effect. He reiterated that the Administrator General had never dealt with the estate of Augustine Chende-ende Mbunda. Therefore the assignment to their mother was irregular. It was his view that the appellants could properly bring the matter as done.
9. Sharpe-Phiri J, upon considering the application before her, found that the Originating Summons was defective for want of endorsement of the Appellants' address and ought to be struck out for irregularity.
10. The learned judge reasoned that the deceased father must have been the initial beneficial owner of Lot 1473/M as evidenced by the certificate of title and entry on the Land's register. The property was later assigned to the

Appellants' mother by the Administrator-General. She referred to Sections 33 and 54 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia which convey that a certificate of title is conclusive evidence of ownership. She concluded that it was unambiguous that the property in question was owned by Margaret Chileshe Mbunda as evidenced by certificate of title. She dismissed the contention that the property was held in trust for the Appellants as the certificate of title did not reveal any entry to that fact. She found that Lot 1473/M was owned by the Appellants' mother and fell to be administered under her estate. It was her view that the Appellants, as personal representatives of their deceased father's estate had *locus standi* to commence the action pertaining to the said property.

11. It was the learned Judge's finding that the Administrator General administered the estate of the late Augustine Chende-ende Mbunda as evidenced by the entry on the Lands Register. The property was conveyed to the Appellants' mother by the Administrator General. She went on to observe that there was no evidence before her to the effect that the Appellants applied for revocation of letters of administration granted to the Administrator General in accordance with Sections 17 and 18(1) and (2) of the Administrator Generals Act, Chapter 58 of the Laws of Zambia. She dismissed the action forthwith.

GROUND OF APPEAL

12. Dissatisfied with this ruling, the Appellants have appealed on three grounds as follows:
- i. The learned Court below erred in law and in fact when she held that there was no trust that was in existence relating to the property Lot 1473/M Lusaka between the Applicants and the late Margaret Chileshe Mbunda;
 - ii. The trial Court erred in law and in fact when she held that the late Margaret Chileshe Mbunda was the beneficial owner of Lot 1473/M, Lusaka and that the property should be administered under her estate, and that therefore the Applicants had no *locus standi* to sue the Respondent in relation to the property;
 - iii. The learned trial judge erred in law and in fact when she did not find as a fact that the estate of the late Augustine Chende-ende Mbunda was not fully administered.

APPELLANT'S HEADS OF ARGUMENT

13. Under ground one, it was submitted that the Court erred in law and in fact in failing to recognize the trust that existed at law when Lot 1473/M Lusaka was transferred to Margaret Chileshe Mbunda after the demise of the Appellants' father. Learned Counsel has referred to the explanation by **Philip H. Pettit** in his work **Equity and the Law of trust 12th Ed** at page 46, that;
- "a minor cannot hold legal estate in land for lack of legal capacity although he or she can have an equitable interest in that land".**

14. It is the Appellants argument that as their father died intestate, they and their mother were the beneficiaries of the property. Thus their mother held it in trust for the children when the property was assigned to her. Learned counsel contends that a constructive trust was created. He referred to **Halsbury's Laws of England, the 4th edition re-issue vol 48 paragraphs 524 and 585**, where the learned authors state that:

... A constructive trust is automatically imposed in circumstances where it is unconscionable or contrary to fundamental equitable principles for the owner of particular property to hold it purely for his [or her] own benefits... A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust but which is held by a person in circumstances where it would be in equitable to allow him to assert full beneficial ownership of the property.

15. Our attention has also been drawn to **Bailes v. Stacy and Another¹**, where the Supreme Court stated as follows:

The nature of a constructive trust is such that every ascertainable circumstance and every relevant fact should be taken into account if, by imputation of equity, a transaction which the parties may have entered into without thought or realisation of legal consequences becomes the subject of a claim against the party in whom the legal title to property is vested by the other who asserts that he has acquired a

beneficial interest. The constructive trust is a creature of equity and may be imposed in order to satisfy the demands of justice and good conscience.

16. It was submitted, premised on the above authorities that a trust existed in equity even though the children's names were not endorsed on the certificate of title when the property was transferred to their mother.
17. Under ground two, it was submitted that the Court erred by holding that the Appellant's mother was the beneficial owner of Lot 1473/M Lusaka. It was argued that she had an interest in the property, which interest has been noted by the Appellants as she was the surviving spouse. However, they too had an interest as daughters of their father. Learned counsel submitted that the Court erred in law when it relied on Section 33 and 54 of the Lands and Deeds Act in isolation. That Section 48 and 11 allow for minority interests to be noted on a certificate of title and provide for correction of omissions. Counsel relied on **Anti-Corruption Commission v. Barnnet Development Corporation Limited**² the Supreme Court held that a certificate of title is conclusive evidence of ownership of land by the holder thereof only if it is not challenged. It was Counsel's submission that the Appellants have *locus standi* as beneficiaries of their late father's estate.
18. As regards ground three, learned counsel submitted that the court erred in law and in fact when it held that no portion of the deceased father's estate was left administered when the children's legal title was pending. It

was submitted that the estate of Augustine Chende-ende Mbunda was not fully administered because the beneficiaries of the property were minors when the property was transferred to their mother. Counsel relied on the case of **In the goods of William Loveday**³ in which it was held that the task of the court upon the exercise of probate jurisdiction is to ensure that beneficiaries get what is due to them. It was submitted that the estate of the Appellants' father was not fully administered because the Appellants were minors and the property did not vest to them.

19. It was learned Counsel's prayer that the appeal be allowed, the ruling of the Court below be set aside and the matter be referred to the High Court for hearing of the Originating Summons.

RESPONDENT'S HEADS OF ARGUMENT

20. In Response to the Appellants' Heads of Argument, the Respondent has argued that the holding of the Court below was sound at law. That the Appellant's attempt to raise the existence of a trust is an attempt to drift away from the questions that were raised in the preliminary issue in the Court below. The question was whether the Appellants had the requisite *locus standi* to commence the action as administrators. The Respondent's contention was that the Appellant ought to have sued as beneficiaries and not administrators. It was argued however that no evidence was adduced to show that the Appellants late mother held the property as trustee for the Appellants.

21. It was learned counsel's submissions that it was unclear whether or not the late Augustine Chende-ende Mbunda died intestate or not. The capacity in which the Administrator-General assigned the property to the parties' late mother was unclear. It may well have been by will.
22. It was submitted that had the Appellants had any interest in the property, the Administrator General who had administered the estate would have ensured that the same were noted on the certificate of title. On the appellant's assertion that the appellants' mother had initiated the process of subdividing the land in question so that it vests in the appellants, learned counsel for the respondent argued that, these allegations remain mere assumptions for lack of evidence. It was submitted that the mere fact that the appellants' mother could subdivide the land proved that she was the beneficial owner as the record showed that she even mortgaged the said property on three occasions.
24. In relation to ground three, it was submitted that the court below was on firm ground in satisfying itself that the Administrator General administered the estate of the late Augustine Chende-ende Mbunda. It is argued that the issue of an unadministered portion of the estate was never raised in the court below and should not be entertained in this court as guided by the case of **Buchman vs Attorney General**⁴. It was argued further that the appellants did not comply with sections 17 and 18 of the Administrator General's Act. Cap 58 of the Laws of Zambia prior to the commencement of these proceedings. It was the respondent's prayer that the

appeal be dismissed as the estate was fully administered by the Administrator General.

25. In Reply, Counsel for the Appellants contended that the affidavit sworn by the Appellants in the Court below and the letters of administration issued out of the Probate Registry of the High Court confirmed the intestacy of the late Augustine Chende-ende Mbunda. Counsel reiterated that a trust existed in equity and could be inferred by the fact that the Appellants mother was not the sole beneficiary of the estate as there were minor interests. It was submitted further that a trust might as well be inferred from the commencement of the subdivision of the property with the view of transferring the same to the appellants.

ARGUMENTS IN REPLY

26. In reply to the Respondent's response to ground three, Counsel for the Appellant submitted that the allegation that Augustine Chende-ende Mbunda's estate was not fully administered was raised in the Court below and was alluded to by the Judge. The Appellants maintained that this appeal ought to be allowed. At the hearing, learned counsel was questioned by the court as to what law applied to Augustine Chende-ende Mbunda's estate, and the effect of the provisions of the Administrator General's Act, as well as the Local Courts Act.

DECISION OF THE COURT

27. We have given this appeal due consideration. The issue raised in the first ground of appeal is whether or not a trust existed on Lot 1473/M

Lusaka. It is remarkable that learned counsel does not state what law he is referring to in arguing that a trust arose in favour of that issue of Augustine Chande-ende Mbunda and Margaret Chileshe Mbunda and how that law came to apply to the estate of the said deceased.

28. As noted by Ngulube Deputy Chief Justice, as he then was in **Moobola vs Muweza, 1990, 1992 ZR P at P 38 Ngulube DCJ** when delivering the judgment of the court, the estate indigenous Zambian who died intestate before the Intestate Succession Act was enacted in 1989 fell to be administered in accordance with the Customary Law applicable to them.

29. At the time the Administrator General administered the estate, the relevant provision of the Administrator General's Act read as follows:

"32(1) This Act shall not apply to the administration of the estate of any person to which the provisions of subsection (1) of section thirty six of the Local courts Act apply, unless the court shall first make an order or given directions that such estate shall not be administered in terms of African customary law.

(2) Nothing in this act or in any other written law shall require or be deemed to require the Administrator General except where he thinks it is in the interest of justice so to do, to make an application to local court claiming that the estate of a deceased person should not be administered in terms of African Customary Law".

30. It will be noticed that the Administrator General's Act was passed in 1925, and underwent amendment and additions. Section 32 was added by Act 14 of 1968. Therefore, this provision was in force at the time of demise of Augustine Chende-ende Mbunda.

Moreover, **section 36 of the Local Courts Act** read as follows:

“36(1) subject to the provision of Section thirty-eight, a local court may, in the request of any properly interested party, make any order, including an order appointing an administrator, which is required for the administration or distribution of the estate of any person who has died intestate and whose estate falls to be administered or distributed in terms of African Customary Law”.

31. The Local Court's Act was enacted in October 1966. Therefore, the cited provision was in existence at the time of the demise of Augustine Chende-ende Mbunda. The Lands register reveals that the Administrator General assigned the property in issue to Augustine Chende-ende Mbunda's surviving spouse. In light of the applicable law, it can only be presumed that the Administrator General complied with section 32 of the Administrator General's Act in dealing with the estate. The appellants did not lay any evidence before the court that would impeach the involvement of the Administrator General in the administration of the estate in question. Therefore, the presumption that the Administrator General competently dealt

with the estate is beyond question. The circumstances also suggest that the estate was not distributed in accordance with African Customary Law.

32. As observed by the learned judge in the court below, the assignment of the property to the surviving spouse by the Administrator General was not questioned for almost four decades, a very long time indeed. Having assigned the property to Mbunda Margaret Chileshe, the Administrator General completed his task. The fact that she held the property in her own right as beneficial owner means that, that was the capacity in which the property was distributed to her. Apart from the vague submission that at law, the appellants were beneficiaries and the property was held in trust for the children, no evidence was laid before the Court to demonstrate how the said trust arose.

33. In addition to the foregoing, the appellants applied to be appointed administrators of the estate that had already been dealt with. In the absence of facts disclosing how the alleged trust arose it was incompetent for the appellants to apply to be appointed as additional administrators and purport to undo what had already been done by a competent administrator of the same estate.

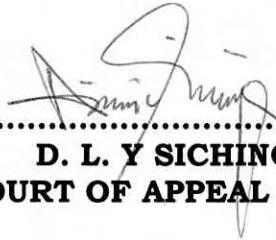
34. The Administrator General concluded his function upon assigning the property to the surviving spouse. It appears the appellants are pursuing the matter in the wrong capacity. The learned trial Judge cannot be faulted for holding that they had no *locus standi* in the circumstances. As the property was assigned to Margret Chileshe Mbunda, she was beneficial owner of the

property, and it fell to be administered under her estate, absent a properly mounted challenge, which does not appear to have been done in these proceedings. The learned Judge cannot be faulted for not finding that the estate of the late Augustine Chende-ende Mbunda was not fully administered in light of our observations above.

35. The appeal is on the foregoing devoid of merit, and is dismissed with costs to the Respondent.



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F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL



.....
D. L. Y SICHINGA
COURT OF APPEAL JUDGE



.....
P. C. M. NGULUBE
COURT OF APPEAL JUDGE